they presented their submissions. We want to express our thanks to them as we have obtained much assistance from their researches. Encik Puthucheary has presented various submissions carefully but we find that we are unable to accept them. We do not think in this case the learned judge has stated the law incorrectly and on the facts there is no reason to interfere with his finding against appellants.

We will now deal with the last ground on costs. Respondents (as plaintiffs) sued the Sanko Asia Line Ltd. (as first defendants) and appellants (as second defendants). The learned judge gave judgment in favour of respondents against appellants with costs. He also ordered appellants to pay costs to first defendants. Order of costs made in this manner is commonly known as a Sanderson Order. We think the learned judge did not make an order as in *Bullock* v. *The London General Omnibus Co. & Ors.*[28] commonly known as *Bullock Order* because it would involve double taxation resulting in added costs.

Appellants argued that respondents were entitled to first defendants' costs from appellants if first defendants were properly joined. First defendants were joined from the start but respondents adduced no evidence against them resulting thereby in the dismissal of the claim against first defendants. It was submitted that first defendants were not entitled to costs. On the other hand, respondents pointed out that they had to consider the question of limitation. They had to bring in first defendants because appellants gave them to understand that the 64 cases were shortlanded. Also, in their defence appellants denied ever receiving the missing goods. At first they refused even to accept the accuracy of the tally sheets but changed their minds later. In such a situation it was not only reasonable and advisable for respondents to join both as defendants but they would have been extremely unwise if they had not done so.

Costs are at the discretion of the court. So long as the court is shown to have exercised the discretion judicially the appellate court should not interfere lightly with such exercise. There is no ground for interference as the learned judge has acted properly in the exercise of his discretion.

For reasons given we would dismiss the appeal with costs here and in the court below.

Appeal dismissed.

Solicitors: *Skrine & Co.; Shearn, Delamore & Co.*

PORT SWETTENHAM AUTHORITY v. THE BORNEO CO. (MALAYSIA) SDN. BHD.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ali F.J.) March 8, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 109 of 1974]

Contracts — Bailment — Duties and responsibilities of bailee — Loss of goods after they were unloaded to wharf — Whether port authority liable — Burden of proof — Contract Act, 1950, ss. 104 and 105.

In this case it was shown that 173 cartons of teets and soothers were unloaded at Port Kelang and were in the custody of the appellants. The respondents managed to take delivery of only 70 cartons. The respondents obtained judgment for damages for the loss of the 103 cartons. The appellants appealed.

Held: (1) where a bailor and bailee relationship exists, then the position is the same as at common law, that is, the onus is on the bailee for reward to show that the loss of the goods was not due to his negligence:

(2) in this case there was no reason for the appeal court to interfere with the finding of the learned trial judge that the appellants had not taken all reasonable care of the consignment in their custody.

Case referred to:-

(1) *Port Swettenham Authority* v. *T.W. Wu & Company (M) Sdn. Bhd.* [1975] 2 M.L.J. 73.

FEDERAL COURT.

Abdullah bin Mohamad Yusof for the appellants.

P. Cumaraswamy for the respondents.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is another appeal by appellants against the decision of the same learned judge ordering them to pay damages in the sum of $40,846.34 to respondents for the loss of 103 cartons of teets and soothers. In so far as points of law are concerned, appellants adopted the arguments made in *Port Swettenham Authority* v. *T.W. Wu & Company (M) Sdn. Bhd.*[1] The judgment of that case has just been delivered. Suffice to say that in upholding the decision of the learned judge we have expressed the view that where a bailor and bailee relationship exists then the position is the same as the common law, that is, the onus is on the bailee for reward to show that the loss of the goods was not due to his negligence.

Except for the fact that the missing goods were not found the other facts of this case appear to be quite similar to that case, particularly the manner in which the missing goods disappeared. Respondents were consignees of 174 cartons of teets and soothers carried by Ex. S.S. "Pando Cape" from London on Bill of Lading arriving at Port Kelang on February 28, 1970. However, only 173 cartons were tallied and discharged. They were removed by forklifts to the godown by port employees. Respondents managed to take delivery of 70 cartons. The other 103 cartons could not be traced. Appellants maintained that they had received only 70 cartons which had been delivered to respondents. They submitted, in the alternative, that if the consignment was received by them in full, which they denied, the same was not removed from the port within the stipulated period. They denied they were negligent and relied on rule 93 of the Kelang Port Authority By-laws, 1965.

Evidence adduced and accepted by the learned judge showed quite convincingly that 173 cartons of teets and soothers were taken by port employees and kept in Shed No. 7. He did not believe that appellants only received 70 cartons. Relevant documents indicated payments of customs duty and inward charges had been duly paid on the goods. On the production of these documents they were entitled to take delivery of the goods and appellants were dutybound to deliver such goods. Appellants could not produce the goods which were proved to have been delivered to their care and custody.

Rule 93 of the Kelang Port Authority By-laws, 1965 reads as follows:—

"If any owner, without any fault on the part of the Authority, fails to remove any goods (other than those stored under special agreement with the Authority) from the port premises within seven clear working days from the date of landing or placing in the custody of the Authority of such goods, the goods shall remain on the port premises at the sole risk and expense of the owner."

The learned judge quite rightly rejected the appellant's plea for two reasons. First, there was evidence to show that six days after the goods landed respondents called to collect the goods but appellants were unable to deliver them. Secondly, there was nothing to show that appellants had averred that the entire consignment was on the port premises throughout the period of seven days after landing. We think it is unfair for appellants to invoke rule 93 when they were blowing hot and cold. They denied they ever received the whole consignment, but evidence showed convincingly that the whole consignment was taken by their employees and kept in their premises soon after landing. They were unable to deliver when demanded before the week expired. Yet, they tried to blame respondents by invoking rule 93.

The clerks in charge of Shed No. 7 and Shed E could not say anything about the particular consignment. Neither could the traffic manager nor the police officer in charge of security throw any light on the particular consignment. Furthermore, record of goods being removed from one shed to another was kept but the record just conveniently disappeared. There seemed to be a sense of laxity among those working in the sheds due, perhaps, to lack of strict supervision.

On the facts the learned judge observed:—

"On the materials before me I am firmly of the view that the defendants had not taken all reasonable care of the consignment in their custody. The defendants' failure to produce records of internal tally seems to show that they had not paid due attention to the maintenance and safekeeping of records pertaining to goods in their custody. Their failure to disclose to the court whether any attempt was made by the port employees to trace the balance of the goods and indeed whether any investigation was made by the police concerning the missing goods necessarily indicates that they had not exercised due care as to the safety of the goods in their custody. I am also inclined to think that they had not properly discharged their duties and responsibilities as bailees of such goods."

These findings were made by the learned judge who had the advantage of seeing and hearing the witnesses and assessing their credibilities. The appellate court should be slow to interfere with such findings. The various points of law have been dealt with fully in *T.W. Wu & Company (M) Sdn. Bhd.'s* case and we do not wish to repeat them here. In this case there is no reason for this court to interfere with the findings of the learned judge.

The appeal would be dismissed with costs here and in the court below.

Appeal dismissed.

Solicitors: *Tunku Zuhri, Manan & Abdullah; Shook Lin & Bok.*

LEMBAGA PELABOHAN SWETTENHAM v. SYARIKAT HIAP BEE

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ali F.J.) March 8, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 110 of 1974]

Contracts — Bailment — Duties and responsibilities of bailee — Loss of goods after they were unloaded at wharf — Whether port authority liable — Burden of proof — Contract Act, 1950, ss. 104 and 105.

This was an appeal from the decision of the High Court which had ordered the appellants to pay damages to the respondents for the loss of 8 cases of stainless steel sheets. The cases were landed at Port Kelang and had been in the custody of the appellants.

Held: (1) where a bailor and bailee relationship exists, then the position is the same as at common law, that is, the onus is on the bailee for reward to show that the loss of the goods was not due to his negligence;

(2) in this case the learned judge was right on the evidence to hold that the appellants had failed to show that the loss occurred otherwise than through their negligence.

Cases referred to:-

(1) *Port Swettenham Authority* v. *T.W. Wu & Company (M) Sdn. Bhd.* [1975] 2 M.L.J. 73.

(2) *British Traders & Shippers Ltd.* v. *Ubique Transport & Motor Engineering Co. (London) Ltd. and Port of London Authority* [1952] 2 Lloyds L.R. 236.

FEDERAL COURT.

Abdullah bin Mohamad Yusof for the appellants.

N. A. Marjoribanks for the respondents.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is yet another appeal by appellants against the decision of the same learned judge ordering them to pay damages in the sum of $31,378.24 to respondents for the loss of 8 cases of stainless steel sheets. Here again appellants adopted the submissions on points of law made by counsel in *Port Swettenham Authority* v. *T. W. Wu & Company (M) Sdn. Bhd.*[1] of which judgment has just been delivered.

Respondents were the consignees of 8 cases or crates of stainless steel sheets shipped on board S.S. "Kotoku Maru". The vessel arrived at Port Kelang on or about April 19, 1970. The goods were tallied and removed by forklifts by port employees to the yardstore where heavy goods were kept. Each crate measured 8'x5'x4' and weighed approximately one ton. Respondents instructed their forwarding agents to take delivery of the goods but the goods were never found. They made a claim against appellants who, as usual, replied that the goods were shortlanded.

The facts of this case are almost the same as those in *British Traders & Shippers Ltd.* v. *Ubique Transport & Motor Engineering Co. (London) Ltd. and Port of London Authority.*[2] In that case 5 tons of corrugated metal sheets delivered to the Port of London Authority were found to have disappeared from the care and custody of the Authority. As the Authority were unable to show that the loss was not due to their negligence they were held liable. The Authority adduced detailed evidence concerning system and security. Lord Justice Morris held that the steel sheets had been delivered by the driver to the Authority. It was not good enough merely to show that the Authority had devised and evolved a good system